



## TESTING EMPLOYEES

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### WORKPLACE SUBSTANCE ABUSE TESTING

A 1985 survey by the National Institute on Drug Abuse (NIDA) found that among employed people between the ages of 20 and 40, 29 percent said they had used an illicit drug at least once in the previous year and 19 percent said they had done so at least once in the previous month. Between 60 and 70 percent said they used alcohol. While the report showed declines in the use of most illegal drugs except cocaine, the results are significant.

Experts agree that alcohol and drug abuse is costly to employers, resulting in increased absenteeism, lower productivity, increased accidents and injuries, and greater use of medical benefits. A 1983 study by the Research Triangle Institute concluded that alcohol abuse cost \$71.5 billion in lost productivity and employment and the losses from drug abuse cost \$34 billion.<sup>1</sup> Another study by the Employee Assistance Society of North America estimates alcohol-related productivity losses at \$39.1 billion per year, and drug-related losses at \$8.3 billion.<sup>2</sup>

In addition to the adverse monetary effects that substance abuse in the workplace has on employers, substance abusers expose their employers to other potential liabilities. Employers repeatedly have been held responsible for injuries to third parties when their intoxicated employees have had automobile accidents while on company business.<sup>3</sup> Many states place a duty on employers to use reasonable care in the selection of employees, and the employer who does not can be held liable if that employee later injures a member of the public or a fellow employee. One employer was held liable for the sexual assault of a guest at the employer's inn by an employee whose alcoholism and tendency toward violence were known by the employer.<sup>4</sup> Employers have also been found liable for negligent supervision of employees, as where a supervisor escorted an intoxicated employee to his car and accepted his assurance that he could make it home safely. The employee had an auto accident, killing himself and several others.<sup>5</sup>

Most employers are well aware of the problems caused by substance abuse, and many have responded by instituting drug and alcohol policies. These policies vary widely, and may include a prohibition of drugs and alcohol at work, rehabilitation or employee assistance programs (EAPs) for addicted employees, and penalties (including termination) for impairment at work due to drug or alcohol abuse. The most controversial component of these policies is drug and alcohol testing.

Substance abuse testing is on the increase in both the public and private sector. On March 4, 1986, the President's Commission on Organized Crime issued a report, "America's Habit: Drug Abuse, Drug Trafficking,

and Organized Crime," which included the recommendation that all employers screen applicants and employees for drugs and adopt a policy of zero tolerance for drugs. President Reagan's anti-drug campaign led to his issuance of Executive Order No. 12564 on Sept. 15, 1986, requiring all federal agencies to adopt drug testing programs for employees in "sensitive positions." The order also authorized the agencies to test applicants and to test employees in non-sensitive positions (a) upon reasonable suspicion of drug use; (b) in investigations of accidents or unsafe conditions; and (c) as part of a follow-up to a drug rehabilitation program. Upon sixty day notice, any employee found to be using illegal drugs is to be disciplined unless he voluntarily identifies himself, obtains counseling, and remains drug-free. Any employee testing positive who refuses counseling or rehabilitation or does not remain drug-free is to be discharged.<sup>6</sup>

In response, the Department of Transportation (DOT) intends to begin random screening of 26,500 civilian employees and mandatory testing of all employees during periodic physical exams and upon reasonable suspicion of drug use. DOT also has proposed pre-employment, post-accident, and random drug testing of commercial aviation pilots. Other agencies are preparing to begin programs. The Federal Railroad Administration implemented pre-employment screens, post-accident and probable-cause testing, and treatment for the railroad industry in 1986. Although positive test results are down, 5 percent of 759 employees involved in accidents still tested positive for drugs or alcohol, prompting calls for random drug testing.<sup>7</sup>

Testing in the private sector is also growing rapidly. Experts estimated in 1985 that 20 to 25 percent of Fortune 500 companies had or were considering drug testing for applicants. A recent survey of the Fortune 100 by the American Management Association reported that about 45 were doing pre-employment testing at one or more sites.<sup>8</sup> NIDA reports that over one-third of all Fortune 500 companies have instituted pre-employment screening.<sup>9</sup> Other recent surveys show between 20 and 33 percent of employers are screening applicants. Of 492 organizations surveyed by the Employment Management Association, 20.9 percent had programs to test employees. Michigan State University reports that 43 percent of those not currently testing for drugs expect to do so in the future.<sup>10</sup>

Some employers are reporting significant results. The U.S. Navy reports that while 47 percent of seamen reportedly used illegal drugs in 1980, that rate has fallen to 4 percent. Southern Pacific Railway reports that since a drug and alcohol testing program was implemented the railway has experienced a 67 percent drop in the number of accidents.<sup>11</sup> In spite of these reported successes, drug testing remains highly controversial. While protests come from several fronts and are directed at a number of issues, the major charge is that drug testing is a serious invasion of an employee's privacy. Critics object that the usual procedure — collecting a urine sample — is extremely intrusive and embarrassing, often requiring an

employee to perform private bodily functions in the presence of an observer. The test results can reveal significant data about the employee's health beside drug use. Critics also charge that the tests are inaccurate and even the best chemical tests can only measure the presence of drugs, not impairment. Yet a recent public opinion poll conducted by the *New York Times* shows that nearly three-fourths of all full-time workers feel that drug testing in the workplace would be the most effective way to curb drug abuse.<sup>12</sup>

The controversial nature of drug testing has led to numerous privacy challenges. As these challenges progress through the courts, additional guidance is being provided on what are permissible substance abuse policies. The most significant factor in the reported cases is whether the employer is a public entity, subject to constitutional restrictions, or a private employer, not restrained by the U.S. Constitution, and whether the testing is random or done as a result of "probable suspicion."

### Constitutional Limits on Testing Public Employees

The Fourth Amendment's prohibition on unreasonable searches and seizures is "designed to protect the personal privacy and dignity of the individual against unwarranted intrusions" by the government.<sup>13</sup> The restriction applies not only to the police, but to all government officials. Through the application of the due process clause of the Fourteenth Amendment, this restriction extends to the states as employers.<sup>14</sup> It has long been accepted that the Fourth Amendment not only protects against unreasonable searches and seizures in a person's home, but also searches of the person. In the leading case of *Schmerber v. California*, the U.S. Supreme Court held that while the use of the results of a blood test to prove intoxication did not violate the privilege against self-incrimination, the Fourth Amendment restricted the circumstances in which a person could be "searched" through the use of a blood test.<sup>15</sup>

Despite strenuous arguments to the contrary by federal and state officials, nearly every court considering the question has determined that drug testing constitutes a "search and seizure" within the meaning of the Fourth Amendment.<sup>16</sup> In accepting the argument that a person has a legitimate expectation of privacy in the collection of urine samples for drug tests, the New York Court of Appeals, the state's highest court, identified the privacy issues involved:

The act of discharging urine is a private, indeed intimate, one and the product may contain revealing information concerning an individual's personal life and habits for those capable of analyzing it. There is no question that requiring a person to disrobe and expose his body or body cavities, or to empty the contents of his pockets, involves a sufficient intrusion on privacy to constitute a search.<sup>17</sup>

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Recognition that drug tests are covered by the Fourth Amendment is only the first step of the inquiry. The difficult issue is whether a search (or drug test) is "reasonable." The reasonableness standard of the Constitution normally requires that public officials have probable cause and obtain a warrant before conducting a search. In some circumstances, however, it may be reasonable to conduct a search without a warrant and without probable cause. In *Bell v. Wolfish*, the Supreme Court stated:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.<sup>18</sup>

While drug and alcohol testing programs by public agencies generally have been permitted, a number of courts have held that the agency must first have a "reasonable suspicion" concerning a particular employee in order to test that employee. In *Capua v. City of Plainfield*,<sup>19</sup> all city firefighters and police officers were ordered to submit to a surprise urinalysis. Those who tested positive were discharged or asked to resign. Several affected firefighters sued the city and sought to enjoin the testing and the use of the test results. A U.S. district court recognized that the particular testing program subjected the employees to a high degree of bodily intrusion where the employees have a legitimate expectation of privacy. The court noted that tests conducted under the surveillance of government officials are likely to be very embarrassing and humiliating, and that the test results can reveal of confidential medical information besides illegal drug use, such as epilepsy and diabetes. While recognizing the city's interest in a drug-free workplace, the court held that the "mere possibility" of discovering that some firefighters might be using drugs and might be impaired in the future was not a sufficient justification for the tests because the Fourth Amendment requires individualized suspicion that a particular employee is using drugs.<sup>20</sup>

The New York Court of Appeals reached the same conclusion in the *Patchogue-Medford Congress of Teachers* case. The court recognized that teachers in New York are required to submit to physical examinations to determine their fitness for duty, and thus have a diminished expectation of privacy. There was no dispute that if school authorities had reason to suspect teachers were unfit for teaching duties, they could be compelled to submit to further examinations, including drug testing. But the court struck down the mandatory testing of all employees as unreasonable where there was no evidence that drug abuse was a problem among teachers generally or in that school district. In mid-July, 1987, two additional U.S. district courts reached similar conclusions. One court found that surprise

mass drug tests of police cadets following a tip that some cadets were using narcotics was unreasonable without individualized suspicion, and granted summary judgment on the cadets' claim.<sup>21</sup> The second court issued a preliminary injunction against random drug and alcohol testing by a public transit system without reasonable suspicion that an employee is under the influence of drugs or alcohol.<sup>22</sup>

Several other courts have rejected the "individualized reasonable suspicion" standard. One case involving jockeys noted that there were compelling state interests in the regulation of the horseracing industry, and because of the regulatory scheme, jockeys had a diminished expectation of privacy.<sup>23</sup> The court upheld a random drug testing program under the "administrative exception" to the "reasonable suspicion" standard, which permits certain agencies to conduct warrantless searches pursuant to their regulatory duties (such as customs searches at the border).

Relying on this same "administrative exception," the U.S. Court of Appeals for the Eighth Circuit ruled in *McDonnell v. Hunter* that the random urine testing of correctional institution employees was reasonable based in part on a diminished expectation of privacy in a prison.<sup>24</sup> Other courts that have rejected the individualized reasonable suspicion requirement and preliminarily upheld mandatory and random testing, have focused on the government's interest in protecting the public when some employees are in "sensitive positions," including air traffic specialists<sup>25</sup> and nuclear power plant employees.<sup>26</sup>

There are several challenges to Reagan's Executive Order pending in the courts, and ultimately the Supreme Court will have to decide how Fourth Amendment protections for public employees apply to drug and alcohol testing. One case involves compulsory drug testing of applicants for positions in the U.S. Customs Service where job duties involved the interdiction of drugs, the carrying of a firearm, or access to classified information. The testing program included a five-day advance notice provision, follow-up tests, and a strict chain of custody for samples. The U.S. Court of Appeals for the Fifth Circuit sustained the program in *National Treasury Employees Union v. Von Raab*.<sup>27</sup> The court found that the test was not as intrusive as a strip or body cavity search, and was to some extent consensual where employees knew of the requirement when applying for the positions. Relying on the *O'Connor v. Ortega* decision, the court focused on the ability of government employers to conduct searches of their employees that would be impermissible in the absence of the employment relationship so long as the search was reasonably aimed at assuring the integrity and competence of employees. Because one of the primary tasks of the Customs Service is the interception of drugs, the court concluded that drug testing of employees was a reasonable intrusion on their privacy.<sup>28</sup>

It is likely that subsequent cases also will look to the *Ortega* decision for guidance on how to balance public employees' expectations of privacy with

the "substantial government interests in the efficient and proper operation of the workplace." The U.S. Court of Appeals for the District of Columbia Circuit has stated that the first inquiry must be whether there are reasonable grounds for suspecting that the search will turn up evidence of work-related drug use, and that the testing must be reasonably related to those circumstances and not excessively intrusive.<sup>29</sup>

### Limits on Testing Private Employees

The Fourth Amendment does not apply to private employers, except under very limited circumstances when they act in concert with a law enforcement agency.<sup>30</sup> Nevertheless, courts and arbitrators can be strongly influenced by constitutional standards of reasonableness when evaluating conduct by private employers. Some state constitutional provisions parallel to the Fourth Amendment may specifically protect privacy interests and a few reach actions by private employers. Constitutional standards also may be cited by employees attempting to show that their discharges violated public policy.<sup>31</sup> Generally, however, claims against private employers alleging that drug testing violates federal or state constitutions or public policy will fail because there is no government or state action involved.<sup>32</sup>

Not all privacy claims rest on search and seizure grounds. A Minnesota woman employed by Domino's Pizza recently challenged the right of the company to test all employees for drugs as a condition of their continued employment. The woman offered to submit to any exam that was limited to on-the-job drug use, or to any exam if the company had reasonable grounds to suspect her of on-the-job use, but she refused to take a mandatory urinalysis. After being discharged, she sued Domino's alleging intrusion into her private affairs, false light invasion of privacy by implying she used illegal drugs, a violation of public policy, and a violation of the implied agreement in a company handbook that testing would be limited to those using drugs or alcohol on the job.<sup>33</sup> Several similar suits, using a variety of contract and tort theories to challenge mandatory drug and alcohol testing, have been filed by the American Civil Liberties Union.<sup>34</sup>

While the key issue in the public sector is the reasonableness of the intrusion, the focus in the private sector is whether employees have any protectable privacy interest. Random, unannounced testing is the most likely to result in employee resentment and legal challenges. A surprise, random test may be viewed as arbitrary and offensive, even to those workers who are most opposed to illegal drug use.<sup>35</sup>

Where the testing is based upon reasonable suspicion or upon legitimate need to protect the health and safety of others, the employer's right to test is usually recognized. One recent example involved an employer's written policy that called for testing if a supervisor had reason to suspect an employee was under the influence of drugs or alcohol on the job; refusal to submit to a test could be considered insubordination. An employee who

reported to work in an intoxicated state refused to submit to a chemical test and was discharged. In response to the employee's claim for unemployment benefits, the court stated:

While each individual possesses a right to personal privacy, when an employee is employed in an inherently dangerous occupation where there exists a substantial risk of harm to himself or others, such right must yield to the employer's overriding concern for the safety of all employees when there is a reasonable suspicion on the employer's part that an employee may be under the influence of some intoxicant.<sup>36</sup>

### The Role of Unions in Testing

The most extensive challenges to substance abuse testing in the private sector have involved unionized companies. This is the result of several factors, including the obligation imposed on employers to bargain over changes in working conditions and the fact that disciplinary action taken against an employee who refuses to take or fails a test can be appealed to a neutral arbitrator who applies the terms of a collective bargaining agreement tailored to workplace problems.

It has consistently been held that significant changes in work rules, particularly those carrying disciplinary measures, affect terms and conditions of employment and are thus mandatory subjects of bargaining. It is becoming generally accepted that drug testing is a mandatory subject of bargaining under the National Labor Relations Act (NLRA). The National Relations Labor Board (NLRB) recently issued an unfair labor practice complaint against Pratt & Whitney for unilaterally implementing a mandatory drug testing program.<sup>37</sup> In analogous situations, the board has held that a policy change requiring employees to submit to polygraph examinations as a condition of continued employment is a mandatory subject of bargaining<sup>38</sup> and the U.S. Court of Appeals for the Third Circuit found that physical examinations were also a mandatory subject. Absent a waiver of the right to bargain about this subject by the employees' union, an employer is required to give prior notice to the union of any proposed substance abuse testing policy and to bargain with the union about the proposal. A failure to do so would be an unfair labor practice in violation of the NLRA.<sup>40</sup>

There have been a number of court decisions involving challenges to drug or alcohol testing policies brought by unions alleging that the unilateral adoption of these programs by private employers violates collective bargaining agreements or the duty to bargain. In *Stove, Furnace and Allied Appliance Workers International Union v. Weyerhaeuser Paper Co.*,<sup>41</sup> the court found that the invasion of privacy caused by the drug test and the "black mark" that would be placed on union members' work records and reputations were injuries that could not be redressed if the

testing were not enjoined pending arbitration and that no irreparable harm would come to the company if the injunction was issued.

A contrary result was reached in the District of Columbia Circuit. One federal judge issued a temporary restraining order against a unilaterally implemented drug testing plan at Potomac Electric Power Co., finding the program "draconian" and "almost unheard of in a free society."<sup>42</sup> Several days later, a different judge dissolved the restraining order and refused to grant a preliminary injunction based upon a finding that any temporary loss of employment could be remedied through the arbitration process. The company also agreed not to implement random testing pending the outcome of the arbitration.<sup>43</sup> These recent developments caution against the unilateral implementation of drug policies in unionized companies. The U.S. Chamber of Commerce, in a recent publication for employers, also advises that all employers discuss the implementation of drug and alcohol tests with unions and seek to develop a cooperative program.

On the other hand, there are some cases arising under the Railway Labor Act where employers have been permitted to implement testing programs unilaterally. In *Railway Labor Executives Ass'n v. Norfolk and Western Railway Company*, one union sought to enjoin Norfolk & Western's implementation of a drug screen urinalysis as part of the railroad's routine medical examinations. N&W moved for summary judgment on the ground that this claim was a "minor dispute," thus permitting the company to proceed with its program. The court found that N&W had a long-standing policy against the use of drugs or intoxicants by any employees. The court noted that the union did not show that the urinalysis was a clear departure from the collective bargaining agreement, was arguably justified under the bargaining agreement to insure that employees are physically fit for their jobs.<sup>44</sup>

Even in situations where notice and bargaining may be required, the parties are not always required to reach agreement. When testing programs are proposed during negotiations for a new agreement, parties are required to bargain in good faith. If the employer and union bargain to an impasse, the employer may be permitted to implement unilaterally a substance abuse policy proposed to the union prior to impasse. But this rule does not permit unilateral implementation of testing while a collective bargaining agreement is in effect.

Further, a union may waive the right to bargain about such a proposal. A waiver may occur through a failure to request bargaining after notice, explicit contract language, or acquiescence in the employer's position in contract negotiations after full discussion.<sup>45</sup> Non-specific, unwritten waivers and consents are not favored by the NLRB, arbitrators, or the courts, and will not eliminate all privacy claims. Even written waivers may be voided by an arbitrator if administered poorly by an employer. An example is *Union Plaza Hotel*,<sup>46</sup> where a woman who worked as a waiter's helper at a restaurant was ordered by her supervisor to undergo a drug test after

exhibiting bizarre behavior during her early morning shift. Although the woman signed a consent form, she became reluctant to take the urine test after learning that she would be required to urinate in the presence of a female nurse. The employee asked to be permitted to take the test in a room without a water source, where there was no possibility that she could contaminate the sample. This was denied. She then asked the nurse for a robe. This was also denied. Ultimately, the employee refused to submit to the test and was discharged.

The arbitrator found that the employer properly required the grievant to submit to the urine test while being observed by the clinician. He concluded, however, that the nurse's refusal to provide the employee with a robe made the conditions of the test "unnecessarily onerous," and the employer exceeded its rights by requiring the employee to take the test in an unusually embarrassing manner, which violated the employee's privacy expectations. According to the arbitrator, an agreement by a union to permit drug testing does not represent a waiver of its member's rights to preserve a reasonable amount of privacy and dignity.

### State Regulation of Private Employers

Numerous bills have been proposed that would regulate private employers' use of drug testing procedures, few have become law. One of the first laws passed is in Vermont, where Act 61 prohibits drug and alcohol testing without probable cause to believe that the employee is using drugs or alcohol on the job.<sup>47</sup> The law also prohibits terminations based upon the results of the drug test unless the employee completes a drug assistance program and then tests positive. Similar laws have recently been enacted in Connecticut<sup>48</sup>, Iowa<sup>49</sup>, Minnesota<sup>50</sup>, and Montana.<sup>51</sup> All these laws require confirmation testing, and two (Connecticut and Vermont) specify the GC/MS test. All four of these statutes, like Vermont's law, limit the situations in which employers can conduct drug tests: reasonable suspicion (Connecticut and Minnesota), probable cause (Iowa), or reasonable belief of impairment (Montana), with some exceptions for high-risk occupations in Connecticut or safety-sensitive positions in Minnesota. Several of these laws also include requirements that policies be in writing and that notice be given to employees, and regulate laboratories.

In contrast, Utah passed legislation protecting the right of employers to conduct drug tests for individual impairment, investigation of accidents, maintenance of safety, productivity, quality of products and services, or security reasons. Employers who institute procedural safeguards are permitted to fire an employee or refuse to hire an applicant who fails or refuses to take a test.<sup>52</sup> Similar legislation passed the New Jersey assembly.

One piece of local legislation receiving national attention is a 1985 San Francisco ordinance that prohibits most public and all private employers from conducting any random or company-wide testing of employees for

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substance abuse. Employees may be tested only if the employer has reasonable grounds to believe that an employee's faculties are so impaired as to pose a clear and present danger to himself and others and if the employer offers the employee the opportunity to challenge the test results.

The debate over when and how drug and alcohol testing can be used is expected to continue in most state legislatures for the foreseeable future. The approaches vary significantly, but even those bills seeking to protect employers from liability mandate that employers use minimally intrusive techniques, institute procedures for proper labeling and handling, and use confirmation tests. At the federal level, attention has been focused on federal workers and public safety workers — primarily in the railroad and airline industries. No comprehensive drug testing bill for private industry has been considered by the full House or Senate.

### *Common Law Privacy Claims*

Undoubtedly many of the concerns that employees express over drug testing arise from the invasiveness and unreliability of the screening technique, from the ways in which erroneous results could be used improperly, and the possibility of human error. Employers who fail to recognize these testing defects may find themselves defending invasion of privacy claims. Absent specific state or federal legislation, it is primarily the common-law torts comprising "invasion of privacy" that define the privacy rights of private employees. Although it may be possible to challenge successfully a drug testing program under several theories, the tort of intrusion has been suggested as the most applicable to employers' interference with employees' off-duty drug use.

The tort of intrusion protects against surreptitious surveillance and similar acts.<sup>33</sup> No court decision has been rendered in an intrusion action challenging a private employer's drug testing program. In a similar context, the U.S. Court of Appeals for the First Circuit in *O'Brien v. Papa Gino's of America*,<sup>34</sup> considered a common law privacy challenge to a polygraph test where an employee was suspected of using drugs outside work. A jury found that the company's allegations of drug use and use of a polygraph test violated the employee's common law right of privacy, and awarded him \$398,200. The issue presented to the jury was not whether the employer was justified in terminating an employee for off-duty drug use, but whether the methods used to investigate those allegations would be highly offensive to a reasonable person and were invasive of his privacy. Opponents of drug testing claim that the urinalysis procedure is equally offensive and intrusive, if not more so.

A second common law theory available is the tort of defamation. In *Houston Belt & Terminal Railway Co. v. Wherry*<sup>35</sup> an employee was discharged after an accident because urinalysis testing revealed traces of methadone, a substance commonly used to treat heroin addiction. A

physician consulted by the discharged employee undertook further urinalysis and discovered that the urine sample contained a compound which, although similar to it, was not methadone. Although advised of this result, the employer refused to reconsider the discharge decision. An internal accident report and a letter from the employer's director of labor relations repeated the allegation that the discharged employee was a recovering heroin addict. A jury awarded the former employee \$200,000 in damages for defamation. This employer might have avoided litigation by not announcing the "medical" conclusions and by establishing a policy of having an independent laboratory re-examine positive test results.

### *Discipline and Discharge for Drug and Alcohol Use*

Drug testing is seldom, if ever, conducted without some prior consideration of what an employer intends to do with the test results. The many approaches and policies implemented in the private sector usually involve rehabilitation (often through an employee assistance program [EAP]), discipline, or discharge. Discharges based upon positive drug or alcohol test results face a variety of legal obstacles, including the status of drug addiction and alcoholism as handicaps under federal and some state rehabilitation acts.<sup>36</sup> Privacy issues arise where the employee argues that his drug use was limited to his personal time and did not impair his work performance. If an employer can show that drug or alcohol use impaired the employee on the job, the discharge decision will usually be upheld. Surveys of arbitration decisions reveal that, more often than not, arbitrators will not uphold discharges based upon off-the-job drug use.<sup>37</sup>

A leading text on arbitration states that the right of management to discharge an employee for conduct away from the plant depends on the effect of that conduct upon plant operations, as where the behavior damages the employer's product or reputation, renders the employee unable to perform his duties or appear at work, or affects other employees' morale or willingness to work with the employee.<sup>38</sup> Where drug or alcohol tests are conducted based upon reasonable suspicion of substance abuse on the job and to confirm those suspicions of impairment, the termination will generally be upheld based on "reasonable suspicion" and positive test results, even in absence of direct proof of actual use on the job. One drawback to random or mandatory drug tests is that they can reveal the presence of certain drugs, including marijuana, days after use. An employer basing a discharge solely on this evidence may encounter difficulty proving that there was good cause for the discharge based upon off-duty drug use if there is no evidence of impaired or substandard job performance.

The U.S. Court of Appeals for the Fifth Circuit recently considered two arbitration decisions involving off-duty activities by employees of Union Oil. Both employees were discharged for use of illegal drugs. The dis-

charge of one employee for use and sale of drugs was sustained because he presented a safety risk. A different arbitrator ordered reinstatement of the other employee after finding him drug-free. The court held that the competing public policies against drug use and favoring rehabilitation were questions for the arbitrator, not the court, and that the reinstatement did not violate public policy.<sup>9</sup>

In non-unionized companies, employers who seek to regulate off-duty drug use by discharging employees who test positive for drugs face the potential for tort claims for invasion of privacy or a suit for wrongful discharge. While the case law is sparse, it is difficult for most employees to claim that they have legitimate rights to possess, sell, or use illegal drugs. As the Supreme Court stated in *United States v. Jacobsen*, "Congress has decided . . . to treat the interest in privately possessing cocaine as illegitimate."<sup>10</sup> Yet employees have an argument that their employers are not entitled to inquire into their private lives at all. The employers' position is much more defensible, particularly where the regulation of off-duty drug use is tied to workplace problems or performance. Employers have an interest in ensuring that off-duty use of drugs or alcohol in no way disrupts or harms the work environment. It is unclear whether a discharge based upon illegal drug use *per se*, without evidence of impaired performance, violates public policy. If an employer has an express or implied just cause standard set out in policies or handbooks, there is a possibility that courts could follow the pattern set in arbitration decisions and force employers to show some negative impact on the workplace.

### Guidelines for Employers

As is readily apparent from the controversial nature of drug testing, the number of privacy challenges to proposed or implemented drug screening is likely to increase. The law with respect to substance abuse policy is not well-developed and provides less than complete guidance to employers. The permissibility of a given policy will probably be determined on a review of the following factors:

#### *Type of Position Covered*

Courts and juries can more easily understand the importance of detecting drug and alcohol use among employees involved in public safety (airline pilots, truck drivers, police officers) and dangerous jobs involving electricity and machinery. Uniform testing of all employees and executives may also be viewed more favorably than testing that excludes management.

#### *Standard for Testing*

Random testing without notice has caused the greatest concern among most commentators. Mandatory testing, such as during an annual phys-

ical, is seen as less intrusive and less arbitrary. Testing that is limited to situations involving an individualized reasonable suspicion of on-the-job impairment is the most likely to withstand challenge.

#### *Written Policies and Notice*

Employers that have a carefully worded, comprehensive, written substance abuse policy and that have given full notice of that policy to applicants and employees have greater latitude than employers that act on the basis of ad hoc unwritten policies. These policies should set out the employer's policy on drug and alcohol use, state when and how testing will be conducted, and identify the penalties for negative results.

#### *Procedural Protections*

Employers that use qualified, experienced laboratories, careful labeling and chain-of-custody procedures, and provide appropriately sophisticated secondary tests to confirm results, have a better chance of defending actions taken on positive results.

#### *Confidentiality of Results*

Employers who insure that test results do not convey other private medical information, that no results are released or announced without confirmation testing, and that all results are conveyed only on a need-to-know basis, can limit the risk of defamation claims.

#### *Standard Triggering Adverse Action*

Employers can more easily justify adverse action for the on-the-job possession of quantities of an illicit drug or levels indicating impairment than they can for only trace amounts of alcohol or marijuana in a urine sample.

#### *Type of Adverse Action*

Employers that offer voluntary rehabilitation programs can more easily defend their substance abuse policies than employers that have no rehabilitation programs and automatically terminate employees for a first offense.

Whatever guidelines are ultimately established for employee drug screening, it is clear that the risk of suits is high. Employers should be careful to implement such programs in a manner that provides for notice of testing, review of results, confidentiality, and fairness in the application of tests.

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